IN THE

Supreme Court of the United States

October Term, 1973

No. 73-253

CLARE HARTE, [illegible] on behalf of all [illegible] and taxpayers of Cook County, Illinois,

Plaintiff-Petitioner,

vs.

ROBERT J. LEHNEN, Former Director of the Department of Local Government Affairs, State of Illinois; MICHAEL J. BAKALIS, Superintendent of Public Instruction of the State of Illinois; and FRANK A. KIRK, Director of the Department of Local Government Affairs, State of Illinois,

Defendants-Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WILLIAM J. SCOTT,
Attorney General of the State of Illinois
160 North LaSalle
Chicago, Illinois

Counsel for Respondents,

Henry Lee Cohen,
Assistant Attorney General,
312 793-3587
Of Counsel.

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FRANK A. KIRK, Director of the Department of Local Government Affairs and DR. JOSEPH M. CRONIN, State Superintendent of Education, by WILLIAM J. SCOTT, Attorney General of the State of Illinois, file this brief in opposition to the Petition for Writ of Certiorari to the Supreme Court of Illinois.

OPINIONS BELOW

The opinion reported at 60 Ill. 2d 542, 328 N.E. 2d 543 is one of a series of interrelated cases decided by the Supreme Court, or now pending before the Illinois courts, involving the implementation of full value property assessment, classification of real property and intra and inter-county equalization. Two of these related cases are reported at 58 Ill. 2d 266, 319 N.E. 2d 55 and 60 Ill. 2d 400, 328 N.E. 2d 11.

QUESTION PRESENTED

Whether it is an abuse of judicial discretion to order the prospective remedy of a long standing problem and to reject non-statutory, burdensome and impractical proposals for retroactive relief.

STATEMENT OF THE CASE

The Illinois Supreme Court held:

> "In our opinion, however, it would be completely inappropriate to direct the Superintendent of Public Instruction to distribute school aid in a manner contrary to law in order to remedy the mistakes of other governmental departments which have ignored the law. Furthermore, to utilize one multiplier for purposes of taxation and a different one for other purposes, such as computing State school aid as urged by [petitioner] does nothing to resolve the fundamental problem, which is the failure of both local and State assessing authorities to implement the statutory system for property assessments designed to achieve uniform equalized assessments among the counties at 50% of actual value. Nor does [petitioner's] remedy alleviate similar problems in other areas, such as public aid, arising from this nonfeasance. While not of major significance in the context of this case, adoption of [petitioner's] suggested remedy would compel taxpayers in those few counties with equalized assessed valuations higher than Cook to contribute portions of their sales and income tax payments (the sources of the common school fund) to make up the amount [petitioner] claims due in Cook County school districts.
>
> The problems presented by this case are the direct result of the failure of governmental officials to perform their duties in the manner prescribed by law. As we indicated in *People ex rel. Hamer* v. *Jones* (1968), 39 Ill. 2d 360, 372, these problems "do not readily lend themselves to judicial solution," and, as the trial court here indicated in denying the preliminary injunction, the remedies sought may cause such additional difficulty, delay and expense as to make their use impracti-

cal. That, in our judgment, is true here as to past years.

As to equalized, assessed valuations for 1975 taxes, payable in 1976, a different situation exists. As to them our judgment in *Hamer* v. *Lehnhausen* (1975), 60 Ill. 2d 400, should prove dispositive and eliminate inequities in future years."

REASONS FOR DENYING THE WRIT

I

The Illinois public school system (as most other services provided by local governmental units) is supported by a tax on the real property located within the local taxing body. (Ill. Rev. Stats. 1973, Chap. 122, § 10-20.3, § 17-2) Each school district (and all other local governmental units) adopts an annual budget, and authorizes a tax levy to meet the district's needs as provided in the budget. (Ill. Rev. Stats. 1973, Chap. 122, § 17-1, § 34-43, 34-44, 34-53) The capacity of the taxing body to raise revenue by a levy is directly related to the total value of its taxable property as equalized. [See e.g. *Serrano* v. *Priest*, 96 Cal. Reptr. 601, 487 P. 2d 1241 (1971); *Rodiguez* v. *San Antonio Independent School District*, 337 F. Supp. 280 (W.D. Texas, 1971), rev. 411 U.S. 1, 96 S. Ct. 1278 (1973)]

The taxing capacity of school districts is enlarged by increases in aggregate assessed valuation, and diminished by decreases. Indeed, the School Code was amended in 1972 (Ill. Rev. Stats., 1973, Chap., 122, §34-44.1) to authorize the Chicago school district to adopt a supplementary budget for the use of added potential revenues when the value of taxable property in the school district is increased by the establishment of a new and higher equalization multiplier.

However, it is the magnitude of the budget and tax levy when extended to individual parcels of real estate, not level of assessment, which determines the actual tax to be collected from each taxpayer.

To encourage a state-wide foundation level of expenditures for public education, when a school district has levied taxes upon itself at prescribed minimum qualifying rates, the School Code provides for an "equalization quota" from the State common school fund to supplement the

district levy so as to produce the sum of $520 per pupil in average daily attendance. (Ill. Rev. Stats. 1973, Chap. 122, § 18-8)

No school district receives the "equalization quota" except as its local taxing effort at the qualifying rate fails to produce $520 per pupil. Some districts tax themselves at less than the qualifying rate and receive no "equalization quota" at all. Most districts tax themselves in excess of the qualifying rate to enable education expenditures in excess of $520 per pupil. The Chicago school district taxes itself at the maximum statutory limit.

Since computation of any State supplement is interrelated with the value of taxable property as equalized by the Department of Local Government Affairs, as revenues produced at the qualifying tax rate decline, the amount of State supplement necessary to produce $520 per pupil increases.

For most Cook County school districts, however, assessment at less than full value as authorized by statute would mean losing approximately $2 in budgeted tax revenue for every $1 gained in State aid.

Consequently, any decrease in the "multiplier" to effect equalization of Cook County real property at less than the statutory 50% of actual value, as petitioner argues, would actually produce unmanageable deficits for the various county school districts unless compensatory tax increases could be enacted.

Moreover, the Revenue Act provides that the equalization factor or "multiplier" is certified to the County Clerk for all taxing purposes, and used to establish taxes to be extended by all the county taxing bodies. (Ill. Rev. Stats. 1973, Chap. 120, § 632, 643; Tr. 545-547) Any change in the "multiplier" intended to produce a reduction in

assessed valuation for school districts would also simultaneously shrink the tax base of all other major taxing bodies and plunge them into unexpected deficits and chaos.

The very issue raised by Petitioner came before the Illinois General Assembly when the Department of Local Government Affairs proposed to reduce the Cook County "multiplier" from the existing 1.59 to 1.48. Strenuous objection was voiced by the school districts and taxing bodies to be affected, and P.A. 78-1097, (Ill. Rev. Stats. 1973 Chap. 120, § 643), effective July 26, 1974, was hurriedly enacted to mandate a freeze of the Cook County multiplier at the higher 1.59 rate certified in 1972.

It should also be noted that, as a consequence of classification, Petitioner's residential property is actually assessed substantially less than the statutory 50% of actual value, and even after equalization remains at a lower level of assessment than identical parcels of residential property in downstate counties.

Non-uniformity is inherent in a classification system, and is recognized and embodied in the 1970 Illinois Constitution [Art. IX, § 4(b)] and amendments to the Revenue Act of 1939 [inter alia, Ill. Rev. Stats. 1973 Chap. 120, § 482(24), § 501 (1)]. In *People ex rel. Kutner* v. *Cullerton,* 58 Ill. 2d 266, 319 N.E. 2d 55, the court found that lack of uniformity per se did not constitute a violation of the due process and equal protection clauses of the constitutions of the United States and Illinois. Moreover, Cook County is accorded special classification under the Revenue Act in many different respects.

II.

In both *People ex rel. Hillison* v. *C.B. & Q. R.R. Co.,* 22 Ill. 2d 88, 102 (1961) and *People ex rel. Kohorst* v. *G.M. & O. R.R. Co.,* 22 Ill. 2d 104, 112 (1961) the allegation had been made that taxpayer's property was assessed

by the Department of Revenue, predecessor to the Department of Local Government Affairs, at 100% of full, fair cash value while locally assessed property, after equalization, was assessed at levels ranging from 38.50% (22 Ill. 2d at 114) to 55% (22 Ill. 2d at 102).

This Court there stated (p. 102):

> "The theory of defendant's tax objection is constructive fraud. Logically, therefore, the measure of recovery should be the amount by which it was 'constructively defrauded' by the failure of the assessing and equalizing authorities to comply with the statutory mandate of assessing and equalizing locally assessed property at its full cash value. This would be the difference between defendant's 1958 taxes and the amount its taxes would have been had locally assessed property been equalized at a level representing 100% of full cash value. Such a measure of recovery is not only more consistent with the theory of constructive fraud, but also involves a less obvious departure from the statutory requirement of full value assessment.
>
> • • •
>
> . . . the departure from the law on the part of the Department of Revenue was not in assessing defendant's property at its full value, but in failing to equalize locally assessed property at its full value."

Because State school aid is a residual grant program, contingent upon the magnitude of local tax collections (Ill. Rev. Stats. 1973 Chap. 122, § 18-8), Petitioner seeks to reassess and re-extend the taxes in 1969 through 1972 in order to claim an increased "equalization quota." If excessive taxes were collected in those years, the taxpayer must be entitled to a refund from the taxing bodies.

It is undisputed by Petitioner that the tax years in dispute are closed and all taxes expended for their budgeted

purposes. In effect, then, Petitioner would have the court go back and attempt to unscramble an egg.

The possibility of a retroactive reassessment was considered in an Attorney General's Opinion, File No. S-404, issued February 16, 1972 to the Department of Local Government Affairs. At page 6 of the opinion, it concludes:

> ". . . you have asked whether the Department has the power to order a reassessment for the year 1970 and prior years on which taxes have been extended and collected. The foregoing statute [Chap. 120, § 621] clearly states that no substitute assessment shall invalidate any prior assessment as to taxes extended thereon. Since the taxes for the year 1970 and prior thereto have already been extended, I am of the opinion that the Department would not have the power to order a reassessment for the year 1970 and prior thereto."

See also *People ex rel. Cannella* v. *City of Chicago,* 7 Ill. 2d 416, 419-420, 131 N.E. 2d 98, 100 (1955); *People ex rel. Town of Cicero* v. *Sweitzer,* 339 Ill. 28, 44, 170 N.E. 728, 734 (1930); *People ex rel. Stettauer* v. *Olsen,* 215 Ill. 620, 624, 74 N.E. 785, 786 (1905).

The law has long been settled that even an illegal tax voluntarily paid cannot be recovered by the person paying it. *Eichman* v. *Anderson,* 23 Ill. App. 2d 329, 333, 162 N.E. 2d 673, 675 (1959); *Davis* v. *Board of Education,* 323 Ill. 281, 282 (1926); *People ex rel. City of Highland Park* v. *McKibbin,* 380 Ill. 447, 452, 44 N.E. 2d 449, 451 (1942). See also, *S.A.S. Co.* v. *Kucharski,* 53 Ill. 2d 139, 142 (1972).

In People ex rel. Eitel v. Lindheimer, 371 Ill. 367, 371, 21 N.E. 2d 318, 320 (1939), this court said :

> ". . . any right to a refund or a credit of taxes is purely of statutory origin, and in the absence of an authoritative statute, taxes voluntarily, though erroneously, paid, cannot be recovered, nor even voluntarily refunded by a county, although there be justice in the claim."

Petitioner makes no allegation that in the years in dispute, taxes were paid under protest as provided by statute. (Chap. 120, § 675, § 716; Chap. 127, § 172)

In *Clarendon Associates* v. *Korzen,* 56 Ill. 2d 101, 106, 108 (1973) the court concluded that, to obtain relief when assessment levels are disputed, the taxes must be paid under protest and objections filed to the application for judgment. Similarly, the court took pains to state in *People ex rel. Hillison* v. *C.B.&Q. R.R. Co.,* 22 Ill. 2d 88, 103 (1961) and *People ex rel. Kohorst* v. *G.M.&O. R.R. Co.,* 22 Ill. 2d 104, 114 (1961), where equalization adjustments were allowed:

> ". . . the amount of recovery is, of course, limited by the amount of the protest."

Since all tax monies belatedly being disputed by Petitioner have been collected and expended, and since no protest payments were made, and no other statutory procedure exists for reassessment or adjustment of past tax years, there can be no retroactive review.

III.

Stripped of its ambiguities, Petitioner has really petitioned the Court to direct payment of millions of dollars from the State common school fund although no statutory authority exists for such a procedure.

Where money claims are involved, the Illinois Court of Claims Act, Section 8(a), Ill. Rev. Stats. 1973, Chap. 37, § 439.8 (a) provides:

> "The Court of Claims shall have exclusive jurisdiction to hear and determine the following matters:
>
> (a) all claims against the State founded upon any law of the State of Illinois, or upon any regulations thereunder by an executive or administrative officer or agency. . . ."

Article VIII, Section 1(b) of the 1970 Constitution of the State of Illinois provides:

> "the State . . . shall make payments from public funds only as authorized by law or ordinance."

The State Controller Act, Section 9, Ill. Rev. Stats. 1973, Chap. 15, § 209 provides:

> "No payment may be made from public funds held by the State Treasurer . . . except by warrant drawn by the Controller and presented by him to the Treasurer . . . No warrant for the payment of money by the State Treasurer may be drawn by the Controller without the presentation of itemized vouchers indicating that the obligation or expenditure is pursuant to law and authorized. . . ."

Petitioner desires remedial and corrective changes to existing statutes.

Only the legislature has the constitutional power to alter the manner in which the common school fund shall be allocated and apportioned, and in the absence of enabling legislation, neither the Court nor Petitioner have discretion to distribute public funds as Petitioner seeks.

By either a public policy or a common sense test, the conclusion to be drawn is the same: if certain school districts outside Cook County have been unjustly enriched due to underassessment, the proper recourse is not an action which ignores the law and wreaks havoc upon the districts which are in compliance with the Revenue Act and School Code.

CONCLUSION

The Illinois Supreme Court has assumed jurisdiction to prospectively resolve the problem of full value assessment and equalization as provided in the Illinois statutes.

The retroactive solution advocated by Petitioner is contrary to law, impractical and would occasion confusion, expense and other inequities. The Illinois Supreme Court has properly exercised its judicial discretion.

Wherefore respondents respectfully pray that the petition for writ of certiorari to the Illinois Supreme Court be denied.

Respectfully submitted,

WILLIAM J. SCOTT,
Attorney General of the State of Illinois,
160 North La Salle Street,
Chicago, Illinois 60601,

Attorneys for Respondents.

HERBERT LEE CAPLAN,
Assistant Attorney General,
312/793-3587
Of Counsel.

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CERTIFICATE OF SERVICE

I, Herbert Lee Caplan, Assistant Attorney General, a member of the Bar of the Supreme Court of the United States, and counsel for the Respondents, hereby certify that I have this 29th day of September, 1975, served three copies of the Brief in Opposition to Petition for Writ of Certiorari upon William J. Harte, Kevin M. Forde, 111 West Washington Street, Chicago, Illinois 60602, by depositing same, first class postage prepaid, in the United States mail chute at 160 North LaSalle, Chicago, Illinois. All parties required to be served here have been served.

HERBERT LEE CAPLAN